IN THE

Supreme Court of the United States

October Term, 1971

No. 71-827

HUGHES TOOL COMPANY

and

RAYMOND M. HOLLIDAY,

Petitioners,

v.

TRANS WORLD AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

Respondent's 57-page discussion[1] of the merits of the questions presented in the petition shows how far apart

1 Petitioners plainly cannot answer all of the factual assertions made by respondent, particularly in the light of the voluminous papers already filed. One of respondent's assertions, however, may illustrate the caution with which the Court should address itself to respondent's brief. Respondent states that its attorney called the $5,000,000 estimate for taking Hughes' deposition "obviously absurd" at the time the estimate was made (Brief in Opposition 17 n). Actually, what TWA's counsel called "obviously absurd" was petitioners' claim that they were resisting discovery in order to avoid the great expense involved (2d Cir. App. A-293). He did not contest the figure itself.

the parties are on these questions of law and only emphasizes the importance of authoritative resolution of the questions by this Court. To take but one example, those engaged in any phase of aeronautics who are considering coming to the assistance of an air carrier need to know whether CAB approval of their acquisition of control, coupled with continuing CAB surveillance of all transactions between the parent and the carrier, provides antitrust immunity for those transactions that take place as a normal incident of control or whether it immunizes only the acquisition itself. That TWA thinks the latter view is correct (Brief in Opposition 45) does not make the question any less significant or less worthy of the attention of this Court.

TWA's position throughout is colored by its reluctance to have this Court speak to the effect to be given a default. *Thomson* v. *Wooster*, 114 U.S. 104 (1885), the case on which both parties necessarily rely in the absence of more recent guidance from this Court,[2] teaches that a default admits "facts properly pleaded." *Id.* at 110. No matter how broadly "facts" may be read, it is a concept that does not include conclusions of law. When TWA asserts, as it has throughout this litigation, that "by defaulting, defendants admitted the antitrust violations alleged in the complaint"

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2 TWA's repeated suggestion that defendants are making an "assault" on or a "criticism of" the *Thomson* case (Brief in Opposition 32, 35) is wrong. Defendants expressly rely on the *Thomson* case and object to the misreading of it by the lower court (Petition, 20, 22).

(Brief in Opposition 55), TWA ignores that distinction. Defendants, in announcing their business decision to proceed no further, said that they did so in order that they might "stand on the questions of law which have been decided to date" (2d Cir. App. A-274, quoted at Brief in Opposition 32). Within the *Hovey-Hammond* rule (Petition 22), they cannot be held to have admitted the legal propositions that they expressly sought to test. Yet TWA finds support for its opposition to review of Questions 4 to 7 in the petition by attributing to the default a broader effect than it properly has, while at the same time arguing that this Court need not speak on the effect of a default.

At the same time—and quite inconsistently—TWA ignores the benefits that did come to it from defendants' business decision. Repeatedly it asserts that the novel and unsound rulings of the courts below were made necessary because the defendants' course had barred it from proving its case in accordance with familiar legal standards (*e.g.*, Brief in Opposition 42, 48, 49). Because of the default, however, the facts must be taken as TWA alleged them, read in the light of what the damage hearing showed about the meaning of particular allegations. If, with the advantage accruing to it from the default, all that TWA can show is that Toolco was at most a potential competitor of aircraft manufacturers, that the supposed violations of the antitrust laws were nothing more than a parent making decisions for its subsidiary, and that this control of the subsidiary was approved by the CAB, TWA must face squarely whether all of this is a violation of the antitrust

laws, rather than contend that different antitrust principles apply to those who are in default than to those whose conduct has been proven at a trial.

Respectfully submitted,

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